No. 89-1936

In the

Supreme Court of the United States

October Term, 1989

KARL AND LUCILLE STEVENS,

Petitioners,

v.

STATE TAX ASSESSOR,

Respondent.

**Petition for Writ of Certiorari
To the Supreme Judicial Court of Maine**

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Is Maine's consideration of non-Maine income in computing the income tax rate to be applied to the Maine income of a nonresident taxpayer consistent with the Due Process Clause, the Privileges and Immunities Clause and the Equal Protection Clause of the Constitution of the United States?

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STATEMENT OF THE CASE

Petitioners Karl and Lucille Stevens ("the Stevenses") at all relevant times were married and were domiciliaries of New Hampshire. For the entire year 1986, Karl Stevens was employed at the Portsmouth Naval Shipyard, a federal enclave located within the boundaries of the State of Maine, and Lucille Stevens was employed in the State of New Hampshire. The Stevenses also had interest, dividend and capital gain income from non-Maine sources.

Because they elected to file a joint Maine individual income tax return for 1986,[1] the Stevenses computed their Maine income tax liability as if they were Maine residents and were allowed, against that liability, a credit which reflected the ratio of their non-Maine adjusted gross income to their total adjusted gross income. 36 M.R.S.A. § 5111(4) (*repealed and replaced by* P.L. 1987, ch. 819, § 2).

In 1988, the Stevenses, represented by the New Hampshire attorney general's office, filed a claim for refund of a portion of their 1986 Maine income tax. The claim was based primarily upon the proposition that Maine's consideration of the Stevenses' non-Maine income in determining the tax rate to be applied to their Maine income constituted, in effect, a tax upon that non-Maine income in violation of the Due Process Clause (Amend. XIV, § 1) of the Constitution of the United States.[2] The Stevenses also asserted that the Maine computation method violated the Privileges and Immunities Clause (Art. IV, § 2, cl. 1) and the Equal Protection Clause (Amend. XIV, § 1) of the Constitution of the United

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[1] Mrs. Stevens' income was reported on this return only because the Stevenses elected to file jointly. 36 M.R.S.A. § 5221(2) (Supp. 1989). If he had chosen to do so, Karl Stevens could have filed a separate return under the rates applicable to single persons and married persons filing separately. *See* 36 M.R.S.A. § 5111(1) (Supp. 1989). He presumably chose not to do so because it was financially advantageous to file a joint return.

[2] $232 of the Stevenses' claimed overpayment of $681 was attributable to their unwarranted presumption that the Maine Income Tax Law would allow nonresidents full, rather than prorated, personal exemptions and deductions if their position in this litigation were sustained. *See Barney v. State Tax Assessor*, 490 A.2d 223 (Me.), *cert. denied*, 474 U.S. 828 (1985).

States. The State Tax Assessor denied the refund claim. On *de novo* appeal, the Kennebec County Superior Court held that Maine's computation method was constitutional. Petition for Writ of Certiorari ("Pet.") 6a-13a.

On appeal, the Supreme Judicial Court of Maine held that the Assessor's reference to the Stevenses' total income to determine the rate of tax to be applied to their Maine income did not violate the Due Process Clause. In addition, the court held that neither the Privileges and Immunities Clause nor the Equal Protection Clause had been violated because the Stevenses were taxed on their Maine income at the same rate at which similarly-situated Maine residents would have been taxed on their total income. *Stevens v. State Tax Assessor,* 571 A.2d 1195 (Me. 1990), Pet. 1a-5a.

REASONS FOR DENYING THE WRIT

The decision below is consistent with precedents of this Court and does not give rise to a substantial federal question.

The decision of the Supreme Judicial Court of Maine is consistent with long-established precedent of this Court and therefore does not merit review. In *Maxwell v. Bugbee,* 250 U.S. 525 (1919), this Court held that New Jersey had constitutionally determined inheritance tax liability with respect to a nonresident decedent by applying its graduated rates to the total property of the decedent and prorating the result by the ratio of the decedent's New Jersey property to his total property. In *Great Atlantic & Pacific Tea Co. v. Grosjean,* 301 U.S. 412 (1937), this Court, relying in part upon *Maxwell,* upheld a

Louisiana license tax statute under which the tax imposed upon each Louisiana chain store was dependent upon the total number of stores, both in-state and out-of-state, in the chain.

More recently, in 1969, this Court dismissed, for want of a substantial federal question, an appeal challenging an income tax statute almost identical to Maine's. *Wheeler v. State,* 249 A.2d 887 (Vt.), *decision adhered to,* 253 A.2d 136, *appeals dismissed,* 396 U.S. 4. *Cf. Davis v. Franchise Tax Board,* App., 139 Cal. Rptr. 797, 799 (1977), *appeal dismissed for want of a substantial federal question,* 434 U.S. 1055 (1978) (constitutionality of California's denial of income averaging to nonresidents was supported in part by California's having foregone its constitutional option of using their total income in its computation of tax on their California income).

The Stevenses now argue that *Maxwell, Grosjean* and *Wheeler* should be reexamined in light of what they describe as this Court's "recent" emphasis upon "economic realities" and the "practical effect" of taxes. Pet. 5-8. In fact, however, this Court's focus upon the practical effect of taxes is nothing new. Within months of its decision in *Maxwell,* for example, the Court stated the need to give less regard to "theoretical distinctions" and more to the "practical effect and operation" of an income tax statute as applied to nonresidents. *Shaffer v. Carter,* 252 U.S. 37, 56 (1920). Furthermore, this Court had no difficulty in overturning an inheritance tax when it actually taxed extraterritorial value. *Frick v. Pennsylvania,* 268 U.S. 473 (1925).

In support of their argument that *Maxwell, Grosjean* and *Wheeler* should be reexamined, the Stevenses primarily rely upon decisions under the Commerce Clause. The

analysis in those cases, however, is not relevant to the Stevenses' challenge here, which is primarily based upon the Due Process Clause. Moreover, the cases relied upon by the Stevenses all involve instances in which this Court has abandoned formalistic wooden doctrines which did not accurately reflect economic realities.

Thus, four of the six cases upon which the Stevenses rely relate to this Court's 1977 rejection of the long-standing commerce clause standard that a tax could not be directly imposed upon interstate commerce. *See Complete Auto Transit v. Brady,* 430 U.S. 274 (1977) (replacing old standard with new 4-prong test); *Japan Line, Ltd. v. County of Los Angeles,* 441 U.S. 434, 441-444 (1979) (continuing vitality of "home port doctrine" not determined because case could be decided under two additional foreign commerce prongs of new commerce clause test); *Commonwealth Edison Co. v. Montana,* 453 U.S. 609, 614-617 (1981) (immunization of tax on local event from commerce clause scrutiny is no longer necessary to protect state's taxing authority); *American Trucking Associations, Inc. v. Scheiner,* 483 U.S. 266, 292-296 (1987) (prior decisions upholding flat taxes for privilege of using a state's highways are no longer appropriate now that interstate commerce may be required to pay its way).

The other two authorities cited by the Stevenses similarly involved the overruling of anachronistic decisions and doctrines. *See Western & Southern Life Ins. Co. v. State Bd. of Equalization,* 451 U.S. 648, 662-668 (1981) (overruling *Lincoln Nat'l Life Ins. Co. v. Read,* 325 U.S. 673 (1945), which had been rendered an anachronism by equal protection decisions dating from 1910 through 1968); *Michelin Tire Co. v. Wages,* 423 U.S. 276 (1976) (overruling *Low*

v. Austin, 80 U.S. (13 Wall.) 29 (1871), which had wrongly decided that imports could not be taxed by states at all until they lost their character as imports). These cases offer no support for the Stevenses' argument that this Court should now review *Maxwell*, *Grosjean* and *Wheeler*.

In contrast to the cases overruled in the decisions cited by the Stevenses, the principle of *Maxwell* is not a "formalistic doctrine" (Pet. 6) but, rather, a mathematical reality. As the Supreme Court of Vermont recognized in *Wheeler*, even if the contested Vermont statute had imposed a confiscatory 100% tax rate, the total amount of Wheeler's Vermont tax liability would not have exceeded his Vermont income, and therefore the Vermont tax did not reach Wheeler's New Hampshire income. 249 A.2d at 890.

Furthermore, it is the Stevenses who ignore economic realities in asserting that Maine, which bases its tax rates for both residents and nonresidents on ability to pay, must ignore the Stevenses' actual ability to pay in this case:

> If a state resolves that it is appropriate for an individual who earns $100,000 to pay at the rate of $.25 on the dollar, it would appear to make no difference in terms of that determination whether the individual accumulated the sum by earning $100,000 in one state or $2,000 in fifty states. The argument for permitting a state to look to a taxpayer's total income from all sources for purposes of its progressive rate structure would therefore seem to be a logical corollary of the rationale for such a rate structure, a rationale that has essentially nothing to do with the territorial limits of the taxing state.

W. Hellerstein, *Some Reflections on the State Taxation of a Nonresident's Personal Income*, 72 Mich. L. Rev. 1309, 1323 (1974).

The Stevenses address equal protection and privileges and immunities only in a footnote, in which they assert that the requisite discrimination between similarly situated residents and nonresidents can be demonstrated if the term "similarly situated" is construed to require a comparison of the Stevenses with a Maine resident who has the same Maine income as the Stevenses but *no* non-Maine income. Pet. 6n.1. This position is supported only by the contention that inclusion of the Stevenses' non-Maine income in the comparison would be "unreasonable" because that income cannot be taxed by Maine. *Id.* However, logic dictates, and the Supreme Judicial Court of Maine held, that residents and nonresidents are similarly situated when they have the same *total* income. 571 A.2d at 1197 (Pet. 4a-5a); *see Wheeler v. State*, 249 A.2d 887, 889, 890-891 (Vt.), *appeal dismissed for want of a substantial federal question*, 396 U.S. 4 (1969).

The Stevenses, attempting to fit this case into the mold of *Austin v. New Hampshire*, 420 U.S. 656 (1975), now assert that retaliation by New Hampshire is likely if Maine's nonresident provisions are not declared unconstitutional. Pet. 8. However, the New Hampshire statute at issue in *Austin* was not found unconstitutional merely because it might have led to retaliation but because it discriminated between similarly situated residents and nonresidents. The Maine statute at issue here does not discriminate in this fashion. To suggest that Maine's statute should be invalidated merely because it is

politically unpopular in New Hampshire[3] and therefore might lead to retaliatory action by the New Hampshire legislature would make constitutional doctrine dependent upon the political attitudes of the New Hampshire electorate. The Constitution does not mandate the overturning of a nondiscriminatory tax law simply because the nonresident taxpayers prefer not to pay the full amount of the tax.

Finally, the Stevenses argue that Maine, by including a Maine nonresident taxpayer's New Hampshire income in the computation of his Maine income tax liability, somehow is exploiting New Hampshire's policy decision not to have a general personal income tax. Pet. 8-9. New Hampshire's tax policy, however, is, irrelevant to this appeal; Maine's measurement of a fair tax, reflecting ability to pay, on Maine income would be no different if New Hampshire had a broad-based personal income tax.[4] New Hampshire's current tax policy serves only to provide New Hampshire residents, who otherwise might be indifferent as to which of the two states taxes their income, with a personal financial stake in minimizing the tax that Maine imposes on their Maine income.

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[3] This political unpopularity is demonstrated by the legislation authorizing the New Hampshire attorney general to represent petitioners in this action. *See* N.H. Laws 1987, ch. 157.

[4] There is no valid reason why a New Hampshire resident's Maine income should be treated as the "low-bracket" income of that resident, thereby leaving his "upper-bracket" income for taxation by New Hampshire or his personal benefit, depending upon New Hampshire tax policy.

CONCLUSION

For the reasons stated above, the Court should deny the petition for writ of certiorari.

Respectfully submitted,

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APPENDIX

U.S. Const., Art. IV, § 2, cl. 1

The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

U.S. Const., Amend XIV, § 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

36 M.R.S.A. § 5111(4) (*repealed and replaced by* P.L. 1987, ch. 819, § 2)

A tax is imposed upon the Maine income of every nonresident individual. The amount of the tax shall be equal to the tax computed under this section and chapter 805 as if the nonresident were a resident, less applicable tax credits other than [the credit for income tax paid to another jurisdiction], and multiplied by the ratio of his Maine adjusted gross income, as defined in section 5102, subsection 1-C, paragraph B, to his entire federal adjusted gross income, as modified by section 5122.

36 M.R.S.A. § 5221(2) (Supp. 1989).

If both husband and wife are nonresidents and one has no Maine-source income, the spouse having Maine source income shall file a separate Maine nonresident income tax return, as a single individual, in which event his tax liability shall be separate; but they may elect to determine their joint taxable income as nonresidents, in which case their liabilities shall be joint and several.

If either husband or wife is a resident and the other is a nonresident, they shall file separate Maine income tax returns as single individuals, in which event their tax liabilities shall be separate; but they may elect to determine their joint taxable income as if both were residents and, in that case, their liabilities shall be joint and several.